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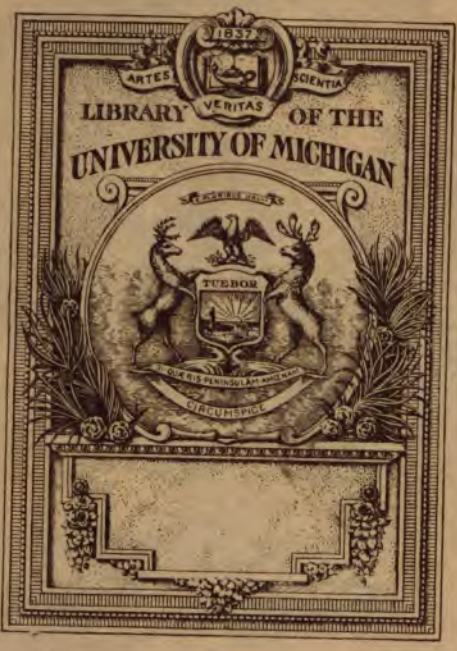
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THE IMPEACHMENT OF THE FEDERAL JUDICIARY.*

[HARVARD LAW REVIEW, JUNE, 1913.]

The principles which govern impeachment in the United States have long been clouded in an atmosphere of mystery. This unsettled condition of the law has been due to a paucity of precedent resulting from the infrequency with which the remedy has been invoked, and to the anomalous scheme of trial whereby the Senate pronounces its findings of fact and conclusions of law through the same vote, thus making it impossible precisely to determine the moving consideration in the judgment of any given issue.

It has been the general notion that impeachment is an engine too ponderous in action to be of practical value in the economy of government, and this notion has given rise to an unwarranted dread of starting its machinery in motion. But I think that the inertia of the impeaching power in this country may be largely attributable to the well-defined limitations which have been fixed upon the tenure of all civil officers of the United States, save the members of the judiciary, who hold their offices during good behavior. In most cases of official delinquency it has been considered advisable to allow the tenure of executive officers to become determined by expiration of time or through dismissal by the appointive power, rather than to resort to the more drastic process of impeachment. Moreover, the judges, with few exceptions, have so demeaned themselves in the performance of their functions as to command the unqualified respect and confidence of the people. Thus there has been but little demand for the exercise of the power of impeachment and but little occasion for the study of its underlying principles.

THE LEX PARLIAMENTARIA OF ENGLAND.

The institution of impeachment is essentially a growth, deep-rooted in the ashes of the past. In common with all our agencies of government it bears the inevitable impress of tradition. It is an extraordinary remedy born of the parliamentary usage of England, and, without sacrificing law to history, we must trace the course of its general development in order clearly to comprehend its reason and philosophy.

The criminal jurisdiction of Parliament had its origin in the general judicial power of the Aula Regia established by William the Conqueror. This tribunal was originally composed of the king's officers of state, including the barons of Parliament and justiciars learned in the law. During early Norman times this great tribunal administered the universal justice of the realm; but as the affairs of government and the transactions of men became more diverse and

* The author of this monograph, Mr. Wrisley Brown, Special Assistant to the Attorney General, conducted the original investigation which resulted in the impeachment of Judge Robert W. Archbald, of the United States Commerce Court. Mr. Brown was also designated by resolution of the Managers on the part of the House of Representatives to assist in the trial of the case before the Senate.—ED.

intricate the impracticability of so multifarious a jurisdiction became sensible. In the reign of Edward the First began the disintegration of this catholic organization, which has been more generally known as the Curia Regis. The High Court of Chancery, the Court of the King's Bench, the Court of the Exchequer, and the Court of Common Pleas became separate and distinct judicial bodies. Although jurisdiction over criminal cases generally was vested in the Court of the King's Bench, the barons reserved to Parliament the right of finally reviewing the judgments of all the other courts of judicature. Thus the Parliament remained the high court of the realm in fact as well as in name.

Upon the separation of Parliament into the House of Lords and the House of Commons residuary jurisdiction to review the decisions of other courts survived in the House of Lords, together with the sole power of adjudicating impeachments prosecuted by the Commons.[1] The practice of impeachment in various irregular forms began during the latter part of the reign of Edward the Third, but it was not until the passage of the famous statute of 1 Henry IV, chapter 14, that prosecutions of this character became governed by definite rules of procedure.[2]

All the subjects of England were amenable to impeachment in the Parliament, irrespective of whether or not they held public office. Peers were impeachable for crime of any grade, but, while it is difficult to understand the reason for the distinction, commoners could be impeached only for misdemeanors or offenses not punishable by death.[3] Upon conviction, the House of Lords exercised authority to impose any penalty which it considered appropriate to the offense. During the primitive stages of the law passion oftentimes prevailed over judgment in these proceedings, especially with respect to impeachments for treason against the Crown in times of revolutionary stress, and many shocking atrocities were committed under the guise of parliamentary justice.

In theory, the process of impeachment was usually directed against offenses of peculiar injury to the state. The ordinary courts were clothed with jurisdiction of sufficient latitude to try and to punish all offenders for violation of the definitive laws; but such courts could not take cognizance of many offenses of a political nature, such as the official misconduct of public officers of rank. It was considered appropriate that high offenders against the state and men of great power and

[1] In Kilbourn *v.* Thompson, 103 U. S., 168, 183–184 (1880), referring to the power of the House of Commons to punish for contempts, Justice Miller said: "This goes back to the period when the bishops, the lords, and the knights and burgesses met in one body, and were, when so assembled, called the High Court of Parliament. They were not only called so, but the assembled Parliament exercised the highest functions of a court of judicature, representing in that respect the judicial authority of the king in his Court of Parliament. While this body enacted laws, it also rendered judgments in matters of private right, which, when approved by the king, were recognized as valid. Upon the separation of the Lords and Commons into two separate bodies, holding their sessions in different chambers, and hence called the House of Lords and the House of Commons, the judicial function of reviewing by appeal the decisions of the courts of Westminster Hall passed to the House of Lords, where it has been exercised without dispute ever since. To the Commons was left the power of impeachment, and, perhaps, others of a judicial character, and jointly they exercised, until a very recent period, the power of passing bills of attainder for treason and other high crimes which are in their nature punishment for crime declared judicially by the High Court of Parliament of the Kingdom of England."

[2] Stephen, History of the Criminal Law of England, 156; 1 Anson, Law and Custom of the Constitution, 354.

[3] Wooddeson's Lectures on the Law of England, Lecture XL, 358.

influence should be tried by the Lords, upon the accusation of the Commons, who composed the grand inquest of the nation. Thus the abuse of official trust in its many and varied ramifications was the cardinal vice which formed the pretext, if not the motive, of most of the well-considered impeachment trials.

Under the lex parliamentaria the commission of crime in contravention of the constituted laws, either written or unwritten, was not essential to impeachability.[1] And, in the very nature of things, it was imperative that this should be the rule and practice of the High Court of Parliament. The internal evils which undermine the polity of a state are too insidious to predetermine; the nefarious workings of political craft are too elusive to classify in advance of their overt manifestation. Indeed, the wisdom of the ages multiplied by eternity would not suffice to devise a system of positive laws that would adequately anticipate the ingenuities of selfish ambition and the machinations of avarice and greed and graft in the administration of the affairs of government. Impeachment was therefore an effective remedy which, together with penal acts against particular offenders, was relied upon by the English people to protect the kingdom against the infidelity and accroachments of its ministers through the recurring vicissitudes of turbulent centuries. And during the memorable epoch preluding the dawn of American independence this especial method of prosecution, though seldom put into application, was still in the flower of its usefulness.

PROVISIONS OF THE FEDERAL CONSTITUTION RELATING TO IMPEACHMENT.

When the constitutional convention of the American colonies assembled to formulate the organic law of the new Republic, impeachment was an institution which had been tried and tempered in the ebb and flow of time. The great collection of harmonized political principles born of the deliberations of that convention was a mosaic of compromises. It contained radical departures from the scheme of government prevailing in the mother country, but its creative experiments were few. Some of its provisions pertinent to impeachment were declaratory, or adaptive, of existing law. Others expressed genuine political innovation which has been widely misunderstood. Let us proceed to group and consider these provisions in their logical sequence and proportion.

[1] "Such kind of misdeeds, however, as peculiarly injure the Commonwealth by the abuse of high offices of trust, are the most proper, and have been the most usual grounds for this kind of prosecution. Thus, if a lord chancellor be guilty of bribery, or of acting grossly contrary to the duty of his office, if the judges mislead their sovereign by unconstitutional opinions, if any other magistrate attempt to subvert the fundamental laws, or introduce arbitrary power, these have been deemed cases adapted to parliamentary inquiry and decision. So, where a lord chancellor has been thought to have put the seal to an ignominious treaty, a lord admiral to neglect the safeguard of the sea, an ambassador to betray his trust, a privy counsellor to propound or support pernicious and dishonorable measures, or a confidential adviser of his sovereign to obtain exorbitant grants or incompatible employments, these imputations have properly occasioned impeachments; because it is apparent how little the ordinary tribunals are calculated to take cognizance of such offenses, or to investigate and reform the general polity of the State." Wooddesson's Lectures on the Law of England, Lecture XL, 358-359.

The English impeachment cases are well collected in 4 Hatsell's Precedents of Proceedings in the House of Commons, 56 et seq.

Section 2 of Article I provides that—

> The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

Section 3 of Article I provides that—

> The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two-thirds of the members present.

This division of authority was fashioned after the English practice. It requires that the proceeding shall be instituted by the direct representatives of the people, and decision of the cause shall be made by the Senators representing the sovereignty of the States. The judgment of the Senate is final, but it can only take cognizance of offenses which are presented by the House of Representatives. The provision that the Chief Justice shall preside over the trial of the President on an impeachment is a device for avoiding the prejudicial effect of a conflict of interest on the part of the Vice President, or President pro tempore of the Senate. It is exceedingly doubtful whether the Chief Justice is entitled to cast a deciding vote when so presiding. The purpose of the arrangement would seem to negative the existence of such a right.

The vote of the majority was sufficient to convict on an impeachment in the House of Lords. But, although ours is essentially a government by majorities, it was thought wise to break the force of faction in the exercise of the impeaching power. Hence it was provided that a concurrence of at least two-thirds of the Senators present should be requisite to conviction. This provision imposes a heavy burden upon the prosecution of an impeachment, but experience has vindicated it as a wise restraint in times of popular excitement and tense partisan strife.

Section 4 of Article II provides that—

> The President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

This section has been the subject of much controversy. The framers of the Constitution, guided by memories of the oppressions practiced in the past and informed by a strange prescience of the exigencies of the future, limited the application of impeachments to civil officers of the United States. It needs but little reflection to bring one to a realization of the wisdom of this limitation. Provision was made in section 5 of Article I for the expulsion of members of the Senate and House of Representatives by a vote of two-thirds of their colleagues present in these respective bodies. By section 8 of Article I the Congress was granted power to make rules for the government and regulation of the land and naval forces, and in pursuance thereof statutes have been enacted providing for the punishment and dismissal of officers of the Army and Navy upon the sentence of courts-martial. But the punishment of private citizens for violation of the penal laws was confided wholly to the courts of judicature.

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plation of this provision for impeachment.[1] Again, it has been asserted by eminent lawyers in the conduct of various impeachment trials that, while indictability may not be the true criterion of impeachability, impeachment under our Constitution presupposes the commission of an offense in contravention of statute or against the precepts of the common law.[2] Neither of these doctrines is tenable upon principle or upon authority.

The phrase "treason, bribery, or other high crimes and misdemeanors" was taken bodily from the nomenclature of the lex parliamentaria of England, where it had acquired a well understood and generally accepted meaning. It is, then, in the nature of a term of art, and by all the recognized canons of construction we must look to its source for light in its interpretation.[3] By the immemorial usage of Parliament many offenses were impeachable which were not indictable or punishable as crimes at common law. Surely, the fathers would not have adopted such a latitudinarian phrase had they intended to narrow its purview and the accustomed range of its application. With the exception of collateral reference to the crime of treason, the Constitution enumerates, but does not define, impeachable offenses. It does not descend to particulars. The removal clause was made designedly indefinite, and it must needs be so construed if it is to serve the purpose of its being.[4] By section 3 of Article III the offense of treason was modified by specific definition and its incidents were materially restricted. The offense of bribery had substantially the same characteristics in both the common and the parliamentary law of England, so that it is not difficult to fasten upon the precise sense in which it is here used. It will be noted that these are offenses primarily and peculiarly against the state, as contradistinguished from offenses against the individual. The phrase "high crimes and misdemeanors" was an expression of denotation which had long been a part of the terminology of the lex parliamentaria, but it was wholly unknown to the municipal law.[5] It is not susceptible of precise definition. Reduced to its lowest terms, it must still be a generalization as broad as the mischief against which the process of impeachment guards. Therefore, its scope may best be illustrated by analogies.

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[1] Probably the best statement of this doctrine is contained in 15 Am. L. Reg., 257. See also minority report of House Judiciary Committee, on the first attempt to impeach President Johnson. (H. Rept. No. 7, 40th Cong., 1st sess., p. 59.)

[2] This theory is well presented in 16 Am. L. Rev., 798.

[3] United States v. Jones, 3 Wash. C. C. R., 209, 215 (1813); ex parte Hall, 1 Pick. (Mass.) 261, 262 (1822).

[4] In the constitutional convention the word "maladministration" was proposed by Col. Mason, but it was objected to by Mr. Madison as too vague, and the words "high crimes and misdemeanors" were inserted instead. (See 3 Madison's State Papers, p. 1528.) However, on June 17, 1789, when speaking in the House of Representatives with respect to the propriety of giving to the President the right to remove public officers, Mr. Madison said: "The danger, then, consists merely in this: The President can displace from office a man whose merits require that he should be continued in it. What will be the motives which the President can feel for such abuse of his power and the restraints that operate to prevent it? In the first place, he will be impeachable by this House before the Senate for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust." 1 Debates and Proceedings of Congress, 497.

[5] In a note to 4 Bl. Comm., 5, Christian says: "The word 'crime' has no technical meaning in the law of England. It seems, when it has a reference to positive law, to comprehend those acts which subject the offender to punishment. When the words 'high crimes and misdemeanors' are used in prosecutions by impeachment, the words 'high crimes' have no definite signification, but are used merely to give greater solemnity to the charge. When the word 'crime' is used with a reference to moral law, it implies every deviation from moral rectitude."

Fraud is a term which has a well-understood signification in equity jurisprudence. It is characterized by an adaptable elasticity which reaches the multitudinous and diverse manifestations of chicanery that the law can not adequately define. Certain general principles control, but each case must stand upon its own bottom. The application of these principles to single instances must, to a large extent, be determined by the wise discretion and trained conscience of the chancellor. So must the discretion and conscience of the Senate determine the issues of an impeachment.

Again, the Articles of War, which have been given the vitality of law in the Army and the Navy by virtue of statutory adoption, provide that conduct unbecoming an officer and a gentleman shall constitute ground for dismissal from the service.[1] It would be obviously impossible to devise any set rules or standard of conduct sufficiently comprehensive to prescribe the constituent elements of such an offense.

The same insurmountable difficulty must be confronted in any legislative attempt to predetermine and define contempts. Such offenses are breaches of privilege which usually hinge upon circumstance, and from their very nature they will not admit of precise definition. Yet it has been held by the Supreme Court that the House of Representatives and the Senate are clothed with power to punish for contempts in appropriate cases.[2]

To determine whether or not an act or a course of conduct is sufficient in law to support an impeachment, resort must be had to the eternal principles of right, applied to public propriety and civic morality. The offense must be prejudicial to the public interest and it must flow from a willful intent, or a reckless disregard of duty, to justify the invocation of the remedy. It must act directly or by reflected influence react upon the welfare of the state. It may constitute an intentional violation of positive law, or it may be an official dereliction of commission or omission, a serious breach of moral obligation, or other gross impropriety of personal conduct which, in its natural consequences, tends to bring an office into contempt and disrepute.[3]

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[1] U. S. Rev. Stat., sec. 1342, art. 61.

[2] Anderson *v.* Dunn, 6 Wheat. (U. S.) 204, 230 (1821).

[3] "Although an impeachment may involve an inquiry whether a crime against any positive law has been committed, yet it is not necessarily a trial for crime; nor is there any necessity, in the case of crimes committed by public officers, for the institution of any special proceeding for the infliction of the punishment prescribed by the laws, since they, like all other persons, are amenable to the ordinary jurisdiction of the courts of justice in respect of offenses against positive law. The purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from office. Such a cause may be found in the fact that, either in the discharge of his office, or aside from its functions, he has violated a law, or committed what is technically denominated a crime. But a cause for removal from office may exist where no offense against positive law has been committed, as where the individual has, from immorality, or imbecility, or maladministration, become unfit to exercise the office. The rules by which an impeachment is to be determined are therefore peculiar, and are not fully embraced by those principles or provisions of law which courts of ordinary jurisdiction are required to administer." 1 Curtis, Constitutional History of the United States, 481–482. See also 1 Tucker on the Constitution, 419; Cooley, Principles of Constitutional Law, 178; Foster on the Constitution, 581 et seq.; 1 Story on the Constitution, 5 ed., secs. 796–799; 2 Watson on the Constitution, 1034; Pomeroy, Constitutional Law, 9 ed., 600 et seq.; Cushing's Law and Practice of Legislative Assemblies, 980 et seq.; Rawle on the Constitution, 209 et seq.; 15 Am. and Eng. Encyc. of Law, 2 ed., 1066–1068; 15 Am. L. Reg., 641, 646.

While the offense must be committed during incumbency in office, it need not necessarily be committed under color of office.[1] An act or a course of misbehavior which renders scandalous the personal life of a public officer shakes the confidence of the people in his administration of the public affairs, and thus impairs his official usefulness, although it may not directly affect his official integrity or otherwise incapacitate him properly to perform his ascribed functions. Such an offense, therefore, may be characterized as a high crime or misdemeanor, although it may not fall within the prohibitory letter of any penal statute. Furthermore, an act which is not intrinsically wrong may constitute an impeachable offense solely because it is committed by a public officer. The official station of the offender may also, to some extent, affect the impeachability of his offense. For example, a judge must be held to a more strict accountability for his conduct than should be required of a marshal of his court, and this discrimination in official responsibility permeates through all the gradations of official rank and authority.

Thus it requires a wide sweep of discretion to deal justly and effectively with political transgressions, and it well accords with the genius of American institutions that such discretion should be reposed in the august body of the Senate.

Section 1 of Article III provides that—

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

By the plain terms of the first clause of this section the judicial power of the United States, and all of it, was granted to courts of judicature. They were clothed, exclusively, with both civil and criminal jurisdiction in the adjudication of legal controversies, and, by the application of a familiar maxim, we must conclude that only such tribunals as were described were intended to perform the judicial function.[2] This underlying fact is highly important to a correct understanding of the springs and sources of the impeaching power under our Constitution, and the failure to recognize it has bred endless error.

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[1] "It is, of course, primarily directed against official misconduct. Any gross malversation in office, whether or not it is a punishable offense at law, may be made the ground of an impeachment. But the power of impeachment is not restricted to political crimes alone. The Constitution provides that the party convicted upon impeachment shall still remain liable to trial and punishment according to law. From this it is to be inferred that the commission of any crime which is of a grave nature, though it may have nothing to do with the person's official position, except that it shows a character or motives inconsistent with the due administration of his office, would render him liable to impeachment." Black, Constitutional Law, 3 ed., 138.

[2] In Martin *v.* Hunter's Lessee, 1 Wheat. (U. S.) 304, 328, 330 (1816), Chief Justice Marshall, referring to this section, said: "Let this article be carefully weighed and considered. The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative that Congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall be vested* (not may be vested) in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish * * *.

"If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all."

See also, United States *v.* Klein, 13 Wall. (U. S.) 128, 147 (1871); State *v.* Sullivan, 50 Fed., 593, 599 (1892); Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co., 37 Fed., 567, 612 (1889).

The second clause contains an assurance of stability in the tenure and emolument of judicial office. This provision is also a derivative of the English law. In the early times the judges held their offices at the pleasure of the king. Such a precarious title was found to be ill suited to the judiciary, and the Parliament, at a rather modern date, divested the Crown of its authority in this respect and granted the judges a conditional tenure, to have and to hold during good behavior. This contrivance was intended to preclude the dismissal of worthy incumbents of the judicial office without cause, and at the same time reserve to the Parliament the power of removing those who should prove to be unfit for judicial office by breach of the condition of their tenure. For a considerable period of time thereafter impeachment was the only process whereby to oust judges who ill behaved. Then, during the early part of the eighteenth century, Parliament initiated the practice of removing unfit judges from office by simple address, without trial, so that at the time of the adoption of our Constitution both remedies were available.

The tenure of all civil officers of the United States, with the exception of the judges, may be automatically determined by the efflux of time, or through the action of the electorate or the appointive power. But the exercise of the impeaching power is the only available means, save death or resignation, whereby the tenure of the judges may be terminated.

It is an elementary rule of construction that every provision of a written instrument, whether it be a will or a contract or a statute or a constitution, should be given full force and effect if it is possible so to do.[1] It follows that the provision granting the judges tenure to hold during good behavior must be read in pari materia with the provision that they shall be removed from office upon impeachment for, and conviction of, treason, bribery, and other high crimes and misdemeanors. The judicial-tenure clause amplifies the removal clause, which proximately precedes it in the Constitution. Each borrows cogency and light from the other.

It was the policy of our organic law that the judiciary should be reasonably independent in the administration of justice. But it was intended that this independence should be an honest independence in the legitimate use of the judicial power. The fathers did not desire to grant the judges a nonforfeitable life tenure, thereby placing the judiciary wholly beyond the sovereign power of the people. Such an indefeasible tenure, with irrevocable authority, would be highly incompatible with a representative form of government. Therefore, following the English custom, it was provided that the judges should hold their offices during good behavior.

This provision is two-edged; it is both protective and admonitive. So long as the behavior of a judge is good, within the meaning of the Constitution, his tenure is impregnable.[2] This behavior which is enjoined by the Constitution must be understood to be a relative

[1] Southerland on Statutory Construction, 284-285, 317-321, 412.

[2] In the seventy-eighth Article of the Federalist, Hamilton alluded to this provision as follows: "The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws."

behavior, although it is governed by immutable laws of right and wrong, to which judicial action should conform. The spirit of the decalogue of judicial conduct does not change, but it must be applied to conditions that change with the development of our civilization. Accordingly, the constitutional provision relating to judicial tenure should be construed with reference to the public morality of the time being, and its sense may vary and does vary with the varying ethical standards of successive generations.

Misbehavior is the antithesis of good behavior. Therefore, it is a breach of the condition subsequent upon which the judicial tenure rests. When a judge exercises the power and appropriates the emoluments of an office that he has thus vitiated he defies the supreme law of the land. If he can not be ousted until his conduct comes squarely within the teeth of the criminal laws, the constitutional provision fixing judicial tenure is little more than an idle play upon words. The proposition implies a monstrous vacuum in the polity of the Nation. A right without a remedy is an anomaly which is violently abhorrent to our system of jurisprudence. Judicial office is essentially a public trust, and the right of the people to revoke this trust is fundamental. The process of impeachment must be their corresponding remedy.[1]

Section 2 of Article III provides that—

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

It has been the contention of learned advocates that this provision presupposes the impeachable offenses to be offenses against the criminal laws. But the courts have repeatedly held that there is no common law of the United States, and if this contention were sound it would follow that the process of impeachment can only lie against acts which have been denounced as crimes by Federal statute. The fallacy of the position becomes apparent when we consider that the statute books were silent with respect to crimes for a considerable length of time after the organic law became operative, and, if statutory enactment were the test, the impeaching power would have been locked in absolute abeyance during that period. Such a result would certainly not fall within the fair intendment of the Constitution. It seems, rather, that this provision serves more sharply to differentiate the offenses for which impeachment is appropriate from offenses against the criminal laws.

Section 3 of Article I further provides that—

> Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

[1] "A civil officer may so behave himself in public as to bring disgrace upon himself and shame upon his country, and he may continue to do this until his name would become a national stench, and yet he would not be subject to indictment by any law of the United States, but he certainly could be impeached. What will those who advocate the doctrine that impeachment will not lie except for an offense punishable by statute, do with the constitutional provision relative to judges which says, 'Judges, both of the Supreme and inferior courts shall hold their offices during good behavior'? This means that as long as they behave themselves their tenure of office is fixed, and they can not be disturbed. But suppose they cease to behave themselves? When the Constitution says, 'A judge shall hold his office during good behavior,' it means that he shall not hold it when it ceases to be good." 2 Watson on the Constitution, 1066. See also Foste on the Constitution, 586; 1 Tucker on the Constitution, 418, 419; The Federalist, art. 79.

This section very materially changed what may be called the dynamics of impeachment. We have seen that from time immemorial Parliament has possessed judicial power, and sometimes wielded it all too freely, to deprive the subjects of England of their property, their liberty, and even their lives. But, by plenary grant, the wisdom of our fathers entrusted the judicial power of the United States to bodies judicial. The basic scheme of coordination tends strongly to negative the existence of an intent to clothe an essentially political body with an overlapping criminal jurisdiction. And, when properly construed, the constitutional provisions bearing on impeachments raise no conflicting implication.

In a true republic no man may be born with a right to public office. Under such a system of government, office, whether elective or appointive, is in its essence a political privilege. The grant of this privilege flows from the political power of the people, and so, ultimately, must it be taken away by the exercise of the political power resident in the people.

Let us mark the contrast by reasoning from the concrete. When the President nominates a candidate for a Federal judgeship he exercises the political power. When the Senate confirms the nomination it exercises the political power. When the House of Representatives impeaches a judge who has thus acquired his commission the political power is again brought into play. Upon conviction of the impeachment, the respondent is removed from office. Perhaps he may be perpetually disqualified to hold any office of honor, trust, or profit under the United States. But here the province of the political power, operating through the medium of impeachment, ceases. Its function has been performed and its force is spent. It has worked a deprivation of political privilege and political capacity, but it has not and could not have taken away a civil right. Divested of his authority for wholly political reasons, the respondent is still subject to condign punishment in the courts of ordinary jurisdiction for the commission of crime against the laws of general application. Thus an impeachment in this country, though judicial in external form and ceremony, is political in spirit. It is directed against a political offense. It culminates in a political judgment. It imposes a political forfeiture. In every sense, save that of administration, it is a political remedy, for the suppression of a political evil, with wholly political consequences.

This results in no confusion of the political and the judicial powers. The line of demarcation is clearly discernible, even through the labyrinth of formal nonessentials under which ingenious counsel in various cases have sought to bury it. The judgment of the High Court of Parliament upon conviction of an impeachment automatically works a forfeiture of political capacity; but this is simply an effect of the judgment, which is to be distinguished from the judgment itself. So, under our system of laws, loss of political capacity is an effect of the sentence pronounced by the courts of criminal jurisdiction upon a conviction of felony. Such judgments are inherently judicial in their nature. The judgment of the Senate on an impeachment, however, must be addressed directly and solely to the political privilege and the political capacity of those who, of their own volition, have submitted to its jurisdiction by the acceptance of public office. In no proper sense is such a judgment a

sanction of retributive justice. It is remedial, but not vindictive. The safeguard of the state is its principal object, and the punishment of the individual is left exclusively to the courts of judicature. It is a disciplinary rather than a penal measure.

Section 2 of Article II provides that—

> The President * * * shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

Under the lex parliamentaria a pardon from the king was not pleadable in bar to an impeachment, nor could it affect the consequence of attainder flowing from conviction upon an impeachment. However, the king could, by the exercise of the pardoning power, suspend or remit the execution of a criminal sentence imposed by the House of Lords in the adjudication of an impeachment.[1]

Inasmuch as the Senate was not vested with power to impose a criminal sentence, this exception of impeachment from the pardoning power made no substantial modification of the law which had theretofore prevailed in England. The reason for the exception is obvious. If the President could grant pardons in cases of impeachment he might, under conceivable conditions, restore to office those who had been deposed by the judgment of the Senate upon conviction of impeachment. The plan and purpose of the remedy would thus be utterly defeated.

THE AMERICAN CASES.

There have been nine impeachments under the Federal Constitution, and of these, six have been aimed at the judiciary. The impeachments which did not apply to the judges, while historically interesting, throw but faint light upon the subject here presented, and for this reason I have confined their treatment to a brief statement in the appended notes.[2]

The first impeachment of a Federal judge, and the first impeachment which was successful, was that of John Pickering, judge of the United States District Court for the District of New Hampshire. In 1803, the House of Representatives impeached Judge Pickering on four articles. The first three articles charged that the respondent had acted in willful contravention of a statute of the United States in the course of a suit brought by the Government to condemn a ship and its cargo under the custom laws. It was specifically alleged

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[1] 1 Stephen, History of the Criminal Law of England, 146; Wooddesson's Lectures on the Law of England, Lecture XL, 367.

[2] William Blount, United States Senator from Tennessee, was impeached in 1797 on five articles, charging conspiracy to promote within the jurisdiction of the United States a hostile military expedition against the dominions of Spain in the Floridas and Louisiana for the purpose of conquering such territory for Great Britain, with which Spain was then at war; conspiracy to incite certain Indian tribes to commence hostilities against the subjects of Spain, in violation of treaty provisions; conspiracy to alienate the confidence of such Indians from the official agent of the United States appointed to reside among them; conspiracy to seduce the official interpreter of the United States appointed to reside among said tribes from the duty of his commission; and conspiracy to foment disaffection among certain Indian tribes toward the United States. Respondent was expelled by the Senate shortly after his impeachment by the House of Representatives. He filed two pleas to the jurisdiction, first, on the ground that a Senator of the United States is not a civil officer of the United States subject to impeachment, and, second, that by expulsion he had ceased to be a Senator. The Senate sustained the first plea and dismissed the impeachment for want of jurisdiction. (3 Hinds' Precedents of the House of Representatives, 644.)

Andrew Johnson, President of the United States, was impeached in 1868 on 11 articles charging the removal of E. M. Stanton, Secretary of War, in violation of a statute known as the tenure of office act, attempting to induce a general officer of the Army to violate the provisions of this statute; and attempti

that he wrongfully delivered this ship to the claimant after its attachment without requiring the prescribed bond of indemnity; that he wrongfully refused to hear the testimony which was offered in behalf of the Government; and that he wrongfully refused to grant an appeal to the Government from his arbitrary decree in final adjudication of the cause. The fourth article charged that upon a certain occasion the respondent had attempted to perform his judicial duties upon the bench in a state of total intoxication, and that upon such occasion he had publicly used the name of the Supreme Being in a profane and indecent manner. No answer was filed by the respondent, and he made no appearance either in person or by attorney. In pursuance of petition, however, Judge Pickering's son was allowed to adduce evidence tending to show that his father was mentally irresponsible. It appeared from the proof that if insanity existed to any extent, which was doubtful, it was due to habitual intemperance. The Senate convicted the respondent on each of the articles, and he was removed from office, but the judgment did not impose a disqualification to hold any office of honor, trust, or profit under the United States.[1]

On March 12, 1804, the same day that Judge Pickering was convicted, Samuel Chase, Associate Justice of the Supreme Court of the United States, was impeached on eight articles, charging certain misconduct to the prejudice of impartial justice in the course of a trial on an indictment for breach of the sedition laws; misconduct in improperly inducing or coercing a grand jury to return an indictment against an editor of a newspaper for alleged breach of the sedition laws, and misconduct in addressing an inflammatory political harangue to a grand jury. An elaborate defense was made by the respondent. The trial resulted in a failure of the impeachment from want of a concurrence of two-thirds of the Senators present, although a majority of the votes were cast for conviction on several of the articles.[2]

James H. Peck, judge of the United States District Court for the District of Missouri, was impeached in 1830 on one general article, containing eighteen specifications, charging abuse of official power and arbitrary conduct in severely punishing for contempt of court an attorney who had published a criticism of one of the respondent's decisions. In his answer the respondent averred that he was legally

to bring into contempt the Congress of the United States by making inflammatory and highly abusive speeches. The respondent was acquitted by a margin of one vote on the second, third, and eleventh articles, whereupon the Senate adjourned sine die without voting upon the remaining articles, and the Chief Justice, who presided at the trial, directed that a verdict of acquittal be entered of record with respect to them (3 Hinds' Precedents of the House of Representatives, 844.)

William W. Belknap was impeached in 1876 on five articles charging the acceptance of a portion of the profits of an Army post tradership from a post trader whom he had appointed. A short while before the House impeached him, Secretary Belknap resigned and his resignation was accepted by the President. He pleaded to the jurisdiction of the Senate on the ground that he was not a civil officer of the United States at the time of his impeachment. The plea was overruled by a majority of less than two-thirds of the Senators voting and the trial proceeded in due course. The respondent was acquitted by virtue of the votes of Senators who had voted in favor of the plea to the jurisdiction. The case is supposed to have established the proposition that a private citizen can not be impeached for offenses committed during previous tenure of public office, although he has admittedly resigned to escape impeachment. (3 Hinds' Precedents of the House of Representatives, 902.)

[1] 3 Hinds' Precedents of the House of Representatives, 681.

[2] 3 Hinds' Precedents of the House of Representatives, 711.

clothed with the authority which he had exercised, or that he was justified in assuming that he had such authority, and denied the existence of malicious motive. The trial resulted in a majority of votes against the impeachment.[1]

In 1862, when the spasm of the times threatened the perpetuity of the Union, the House of Representatives impeached West H. Humphreys, judge of the United States District Court for the District of Tennessee. Seven articles were adopted, charging the making of a public speech inciting revolt and rebellion against the United States; support and advocacy of the ordinance of secession; aiding and abetting an armed rebellion against the United States; conspiring to oppose the authority of the United States by force and arms; refusing to perform the functions of his office; and wrongfully causing arrests and confiscations as a judge of the Confederate States. The respondent filed no answer to these articles and made no appearance. The trial proceeded in his absence, and he was convicted on all the charges, with the exception of the second specification of the sixth article, which alleged wrongful confiscation of property of citizens of the United States to the use of the Confederacy. By the judgment of the Senate, upon a unanimous vote, the respondent was removed from office and branded with perpetual disqualification to hold any office of honor, trust, or profit under the United States.[2]

The next impeachment affecting the judiciary was that of Charles Swayne, judge of the United States District Court for the District of Florida. In 1904, this judge was impeached on twelve articles, charging that he had rendered false claims against the Government of the United States in his expense accounts; that he had appropriated to his own use, without making compensation therefor, a certain railroad car belonging to a defunct railroad company then in the hands of a receiver appointed by the respondent; that he had resided outside of his judicial district in violation of statute; and that he had maliciously adjudged certain parties to be in contempt of his court and had imposed excessive punishments upon them. The respondent defended, and the trial resulted in a majority of votes against conviction.[3]

In 1912, the House of Representatives impeached Robert W. Archbald, United States Circuit Judge, designated a member of the Commerce Court. This case presents the only satisfactory test of the remedy of impeachment as applied to the judiciary, and for that reason a somewhat particular review of its most salient features is required. There were thirteen articles exhibited against Judge Archbald. The first six articles, with the exception of artic'e four, charged the respondent with the use of his official power and influence to secure business favors and concessions, in transactions relating to coal properties, from railroad companies and their subsidiaries having litigation before the Commerce Court. Article four charged secret correspondence between the respondent and counsel for a railroad company regarding the merits of a case then pending before the Commerce Court. Articles seven to twelve, inclusive, charged misconduct as a United States district judge, which office the respondent held immediately prior to his appointment as circuit judge. These charges re-

[1] 3 Hinds' Precedents of the House of Representatives, 772.
[2] 3 Hinds' Precedents of the House of Representatives, 805.
[3] 3 Hinds' Precedents of the House of Representatives, 948.

lated to the alleged use of his official influence to secure credit and other favors from parties having litigation in the court over which he presided; the acceptance of a purse from certain members of the bar of his court; a trip abroad at the expense of a magnate of large corporate interests; and the designation of a general railroad attorney to be jury commissioner. Article thirteen was in the nature of a blanket count, charging a general course of misconduct which embodied all the various acts alleged in the other articles.[1]

The answer interposed by the respondent consisted of demurrers to all the articles, which were coupled with a plea in the nature of a special traverse to each of the articles with the exception of the sixth and the thirteenth. The pleas and the answer admitted most of the primary facts alleged, but denied the existence of wrongful intent.[2] The replication filed by the Managers on the part of the House of Representatives reiterated the sufficiency of the articles in law and in fact.[3]

Counsel for the respondent challenged the jurisdiction of the Senate to consider the offenses alleged in articles seven to twelve, inclusive, on the ground that they were committed, if at all, prior to his appointment as circuit judge. It was also argued at great length that the acts charged in the articles, and established by the evidence, did not constitute impeachable offenses.

The respondent was ably defended, but the trial resulted in his conviction by an overwhelming vote on the first, third, fourth, fifth, and thirteenth articles.[4] By the judgment of the Senate he was removed from office and disqualified to hold any office of honor, trust, or profit under the United States. For the first time in any impeachment case under the Federal Constitution this perpetual disqualification was imposed by a vote of less than two-thirds of the Senators present.

It seems fair to conclude from the vote on the thirteenth article that judges are impeachable for a general course of misbehavior embracing a series of acts that are subversive of judicial probity or propriety chiefly because of the persistency with which they are committed. This is not to be understood as a holding that many legal naughts may, collectively, become a legal unit, but rather that a continuation of transactions which are not seriously irregular when standing alone may become component elements of a system of misconduct sufficient to support an impeachment.

All the articles charging offenses which were committed while the respondent held the office of United States district judge failed of conviction. The considerations which brought about this result can only be surmised, but it is likely that it was due to a cautious disinclination on the part of the Senate to establish the precedent that a civil officer may be impeached for offenses committed in an office other than that which he holds at the time of his impeachment. Such a doctrine would probably be vicious in principle, for, if carried to an extreme, it might well develop an actual case of relentless vengeance suggesting the immortal story of Jean Valjean.

The impeachments that have failed of conviction are of little value as precedents because of their close intermixture of fact and law,

[1] 48 Cong. Record, 9051.
[2] 48 Cong. Record, 9795.
[3] 48 Cong. Record, 9983.
[4] 49 Cong. Record, 1439.